Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

MARTIN HOOD,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 39(b) of the Federal Rules of Civil Procedure gives the district courts discretion to order a trial by jury despite a failure to make a timely demand under Rule 38(b) or Rule 81(c). In a long series of decisions, including this one, the United States Court of Appeals for the Ninth Circuit, and perhaps for the Second Circuit, have flatly denied district courts any discretion to order a trial by jury where the failure to make a timely demand is due solely to inadvertence. All the other courts of appeals have adopted a more flexible interpretation allowing the district courts, in this circumstance, to consider other factors, primarily inconvenience to the court or prejudice to the other party. Which of these interpretations is more consistent with the language and purpose of Rule 39(b)?

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PETITION FOR WRIT OF CERTIORARI

Martin Hood respectfully asks that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit, dated December 3, 2003, (App. A-1) is not reported. The order of the Court of Appeals denying the petition for rehearing en banc (App. A-3) is not reported. The opinion and decision of the magistrate denying the motion, under Rule 39(b), for a trial by jury (App. A-4), is not reported. The opinion and decision of the district court (App. A-6) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 2003. A timely petition for rehearing en banc was denied on January 23, 2004. (App. A-3) The jurisdiction of the Court is provided by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States states, in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Rule 81(c) of the Federal Rules of Civil Procedure provides, in relevant part, that: "These rules apply to actions removed to United States district courts from the state courts and govern procedure after removal . . . [A] party entitled to a trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served . . . [if the party is not the

petitioner] within 10 days after service on the party of the notice of filing the petition."

Rule 39(b) provides, in relevant part, that: "Issues not demanded for trial by jury as provided by Rule 38 shall be tried by the court, but notwithstanding the failure of a party to demand a jury in a action in which such a demand might have been made of right, the court, in its discretion, may order a trial by a jury of any or all issues."

The full text of these rules and of other rules cited in this petition are set forth in the Appendix B.

STATEMENT OF THE CASE

This action, for breach of an insurance contract, was filed in a state court in Hawaii on February 13, 1998. The insurer, respondent in this Court, had refused to pay a claim for damages suffered by petitioner when his house was consumed in a fire, asserting that petitioner had set the fire. The complaint named as defendants respondent and an individual who, like petitioner, was a citizen of Hawaii. When the state court entered a summary judgment dismissing the action against the individual defendant, thus creating full diversity of citizenship, respondent, on January 13, 1999, filed a notice of removal to the District Court of Hawaii. On February 19, 1999, petitioner filed an untimely demand for a trial by jury. No response was filed. No action was taken by the court.

On April 19, the court held a status conference and set a trial date of February 29, 2000, close to a year away. In fact, the trial did not start until September, 2001, almost 2-1/2 years later. The day after the status conference, respondent filed a motion to strike the demand for a trial by jury. It was heard and decided by a magistrate who refused to order a trial by jury.

The action was then tried by the court which held for the respondent. An appeal was taken, asserting only that the district court erred in holding that it had no authority to order a trial by jury. The appeal was denied. A petition for

reheating en banc filed on December 29, 2003, was denied without opinion on January 23, 2004.

REASONS FOR GRANTING THE WRIT

1. **A conflict exists among the courts of appeals.** The magistrate refused to order a trial by jury, giving as his reason—despite the language of Rule 39(b)—that "this Court has no discretion to order a jury trial under F.R.C.P. 39(b)." The Court of Appeals, although asserting that it reviewed for abuse of discretion, affirmed on the ground that "[o]ur established law precludes Hood's claim: 'An untimely request for a jury trial must be denied unless some cause beyond mere inadvertence is shown. *Pac. Fisheries Corp. v. HIH Casualty & Gen. Ins. Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001)' " (App. p. 1, emphasis added.)[1/]

If this action had been filed in a United States district court in the First Circuit,[2/] or in the Third Circuit,[3/] or in the Fourth Circuit,[4/] or in the Fifth Circuit,[5/] or in the Sixth Circuit,[6/] or

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[1/] The assertion that the decision below was reviewed "for abuse of discretion" is plainly mistaken. The magistrate stated that he had no discretion and, in the statement quoted above, the Court of Appeals agreed that, under the circumstances, he had none.

[2/] *Rowlett* v. *Anheuser Busch Inc.*, 832 F.2d 194, 200 (1st Cir. 1997) (broad rule that the exercise of discretion by the district court will almost never be reversed).

[3/] *S.E.C.* v. *The Infinity Group Company, et al.*, 212 F3d 180, 195-196 (3rd Cir. 2000).

[4/] *Malbon* v. *Pennsylvania Millers Mut. Ins.*, 636 F.2d 936, 940 fn. 10 (4th Cir. 1980).

[5/] *Swofford* v. *B & W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964) *cert. denied*, 379 U.S. 902 (1965) (grant of the motion is appropriate "in the absence of strong and compelling reasons to the contrary").

[6/] *Kitchen* v. *Chippewawa Valley Schools*, 825 F.2d 1004, 1013 (6th Cir. 1987) (inadvertence is a basis for denial but a jury trial should be granted "in the absence of strong and compelling reasons to the contrary").

in the Seventh Circuit,[7] or in the Eighth Circuit,[8] or in the Tenth Circuit,[9] or in the Eleventh Circuit,[10] or in the District of Columbia Circuit,[11] it is likely that the district court would have granted a request under Rule 39(b) for a jury trial. At the very least, every one of those courts would have exercised the discretion conferred upon it by Rule 39(b), and after considering all the relevant factors, made its decision. None of those courts would have been bound by a rule, imposed by its court of appeals, that where no explanation was given for a failure to make a timely demand, the court had no discretion to consider other relevant factors. To be sure, many district courts have denied motions to order a jury trial in these circumstances and their decisions have not been reversed, but district court decisions ordering a trial by jury under Rule 39(b) are rarely, if ever, reversed for abuse of discretion.

The opinions in the other courts of appeal do not speak in a single undeviating voice. It is unnecessary to explore here, at length, the several subtle distinctions among them. They plainly permit the district courts to exercise the discretion conferred by Rule 39(b) in cases where no other explanation for the untimely demand is offered other than inadvertence. The conflict between the interpretation of Rule 39(b) in the Ninth and Second Circuits and that given in the rest of the country is sharp and clear.

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[7] *Members* v. *Paige*, 140 F.3d 699, 703 (7th Cir. 1998) ("Rule 39(b) does not require litigants to surmount a hurdle such as 'excusable neglect,' it is an open-ended grant of discretion . . .".

[8] *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980) (jury trial should be "liberally granted" despite untimely demand "when no prejudice results").

[9] *Nissan Motor Corp.* v. *Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992) (same rule as the 6th Circuit).

[10] *Sullivan* v. *School Bd. of Pinellas County*, 773 F.2d 1182, 1188 (11th Cir. 1985).

[11] *BCCI Holdings* v. *Khalil*, 214 F.3d 168, 170 (D.C. Cir. 2000) (district courts have "wide discretion" under rule).

If this case had been filed in a state court and removed to a district court in the Second Circuit, a request for a trial by a jury, pursuant to Rule 39(b), would almost certainly have been granted. In *Cascone* v. *Ortho Pharmaceutical Corp.*, 702 F.2d 389 (2nd Cir. 1983) the Court of Appeals for the Second Circuit affirmed a district court decision that had ordered a trial by jury under Rule 39(b). The Court of Appeals, relying in part on an earlier decision with a complicated history, *Higgins* v. *Boeing Co.*, 526 F.2d 1004 (2nd Cir. 1975), held that in a removed action where the plaintiff's lawyer practiced primarily in the state court, and had only been admitted in the federal court for one year, the district court properly ordered a trial by jury, even though no explanation was given for the untimely request. The Court of Appeals, however, expressly refused to overrule its earlier decisions that in an action filed in the district court and where no explanation was offered for an inadvertent untimely motion, that court had no such discretion, presumably even if the lawyer was young and inexperienced.

The instant case was filed in a state court and removed, so that there is a direct conflict between the law in the Ninth Circuit and that in the Second Circuit, even though they are in agreement respecting the law governing actions filed in a federal court. The distinction made in the Second Circuit is, we believe, untenable and petitioner does not ask that this conflict be resolved. The courts in both circuits, rather, should be required to exercise the same discretion as is available to the district courts throughout the rest of the country.

Curiously, the Court of Appeals for the Ninth Circuit has never provided a rationale or explanation for its adoption of this rigid and harsh interpretation. In an early case, *Mardesich* v. *Marciel*, 538 F.2d 848 (9th Cir. 1970), the court affirmed the district court's refusal to grant a jury trial, citing a decision by the Court of Appeals for the Second Circuit,

which had earlier adopted the same rigid rule.[12] The court below has followed the same interpretation of Rule 39(b) ever since, right up to the present case, without analysis and solely on the basis of previous decisions, primarily *Mardesich*.[13]

2. **The issue is important and the Ninth Circuit's gloss on Rule 39(b) is unsound**. This case is important because it involves one of the most precious of our constitutionally protected rights.

> Maintenance of the jury, as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500, 501 (1959). For that reason, "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). The right to trial by jury is a "sacred" one that "should be

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12/ *Noonan* v. *Cunard Steamship Company*, 375 F.2d 69 (2nd Cir. 1967). The support offered by the court for this decision was deeply flawed. The principal basis for the decision was that a large number of district court decisions had adopted this rigid interpretation. There are many issues of fact, the Court asserted, that a judge can resolve just as well as a jury. 375 F.2d at 72. That may be right. But the statement shows a sad misunderstanding of the significance of the right to a trial by jury in our jurisprudence, which makes that fact irrelevant so far as the Seventh Amendment right is concerned.

13/ *Chandler Supply Co.* v. *GAF Corp.*, 650 F.2d 983, 987 (9th Cir. 1980); *Lewis* v. *Time Inc.*, 710 F.2d 549, 556-7 (9th Civ. 1983); *Craig* v. *Atlantic Richfield Co.*, 19 F.3d 472, 477 (9th Cir. 1999) (plaintiff mistakenly relied upon defendants' demand for jury trial); *Kletzelman* v. *Capistrano Unified School Dist.*, 91 F.3d 68,71 (9th Cir. 1996); *Pacific Fisheries Corp.* v. *HHH Cas. & Gen. Ins.*, 239 F.3d 1000, 1002 (9th Cir. 2001); *Kulas* v. *Flores*, 255 F.3d 780, 784 (9th Cir. 2001); *Zivkovic* v. *S. Cal. Edison Co.*, 302 F.3d 1080, 1086 (9th Cir. 2002) (no exception for *pro se* litigant).

jealously guarded by the courts." *Jacob* v. *City of New York*, 315 U.S. 752 (1942).

Rule 38(d) does declare that a failure to make a timely demand shall be treated as a waiver of the Seventh Amendment right. But that is immediately followed by the grant of discretion, in Rule 39(b), to forgive or not enforce the waiver. All the pertinent decisions of this Court suggest that this discretion should be liberally exercised. Factors such as the lack of inconvenience to the court and the absence of prejudice to the opposing party even when the party's lawyer can offer no excuse for the lapse, as most of the courts of appeals have held, are surely entitled to great, perhaps even controlling, weight. Almost all the courts of appeals have encouraged the district courts to exercise their discretion in this way.

Regrettably, it appears from the reports that there are too many motions for a jury trial under Rule 38(b) and Rule 81(c) that are filed out of time. Because of the importance of the right to a trial by jury, this Court wisely provided a different standard, when the federal rules of civil procedure were first adopted, for excusing to meet the time limit set forth in Rule 38(b) than the standard for excusing a failure to meet time limits set forth in other rules. Rule 6(b) deals generally with requests for enlargement of time where, under other rules, some action must be taken within a specified time. Where the request is made before the specified time has expired, "some cause" must be shown. Where the time has expired, enlargement is still permitted but the failure to act within the specified time must be due to "excusable neglect." Rule 6(b)(2). The rule also deprives the court of discretion to enlarge the time under certain specified rules, not including Rule 38(b). Rule 39(b), in contrast, does not speak in terms of enlargement of the time set forth in Rule 38(b). It is rather a broad grant to the district court, in its discretion, to order a jury trial at any time. That would certainly seem to call always for consideration of all the relevant facts and circumstances.

The Court of Appeals has, in effect, imported into Rule 39(b) factors such as "for cause shown" or "excusable neglect," even though this is flatly inconsistent with the plain implication of the carefully drafted language of the rules, read as a whole. Its decision is unsound.

CONCLUSION

Litigants in the large Ninth and Second Circuits should be entitled to the same, not greater, limitations upon their right to a trial by jury as those applicable to litigants in the rest of the country. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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